

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-6014

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-6014

KEITH D. GAINES,

Appellant,

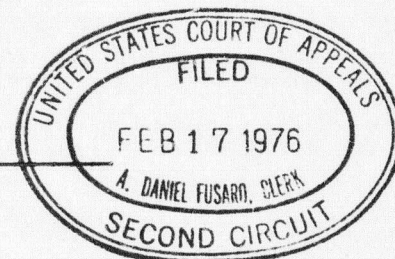
-against-

MARTIN R. HOFFMAN, SECRETARY
OF THE ARMY and SUPERINTENDENT,
UNITED STATES MILITARY ACADEMY,
GENERAL SIDNEY BERRY,

Respondents.

On Appeal from the United States District Court
for the Southern District of New York

APPELLANT'S BRIEF



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I N D E X

	<u>Page</u>
Statement of the Case.....	1
Statement of Facts.....	2
POINT ONE -	
DEFENDANTS FAILED TO ADHERE TO THEIR OWN REGULATIONS GOVERNING CONSIDERATION AND PROCESSING OF ALLEGED HONOR CODE VIOLATIONS BY APPELLANT	
A. The Action of the Superintendent in Referring for Trial Before a Board of Officers an Allega- tion of Lying not Founded by the Cadet Honor Committee Violated the Academy's Own Regulations and Tainted the Entire Board Proceedings.....	7
1. The Academy procedures within the Cadet Honor Committee.....	9
2. The Academy procedures after the Cadet Honor Committee has acted and reported out an Honor violation.....	13
B. The Board of Officers Convened to Heard the Charges Against Plaintiff was Improperly Constituted Thereby Depriving Plaintiff of a Fair Hearing and Due Process of Law.....	19
POINT TWO -	
THE DECISION TO ORDER APPELLANT TO ACTIVE DUTY AS AN ENLISTED MAN FOR THREE YEARS WAS UNDULY HARSH AND WAS MADE IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW.....	23
Conclusion.....	27

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APPELLANT'S BRIEF

Statement of the Case

Appellant instituted this action for an order of mandamus and for a preliminary and permanent injunction enjoining respondents from ordering him to active duty in the United States Army for a period of three years and requiring them to set aside their determination that appellant be separated from the United States Military Academy at West Point, New York and ordered to active duty as above, by order to show

cause on October 16, 1975. That order was signed by the Honorable John M. Cannella and, by consent of the respondents, appellant's orders to report for active duty on October 20, 1975, were stayed. Thereafter, Judge Cannella issued an opinion and order on January 12, 1976 denying appellant's motion for a preliminary injunction and staying appellant's orders to report for active duty until January 26, 1976 (A. 1).^{*/} Respondents consented to extend that stay until January 27, 1976, on which date this Court granted appellant's motion for a stay pending a determination of this appeal. By order of this Court this appeal is perfected as an expedited appeal.

Statement of Facts

KEITH GAINES, appellant herein, enrolled in the United States Military Academy at West Point (hereinafter "Academy") in July, 1971. Shortly before his expected graduation date of June, 1975, appellant was separated from the Academy, denied academic credit for his last semester's work, denied his diploma and officer's commission and was ordered to active duty in the United States Army for three years as an enlisted man.

Prior to his separation from the Academy, appellant had satisfactorily completed all course work and other require-

^{*/} References are to Appellant's Appendix.

ments of the Academy and had satisfactory conduct ratings throughout.

The facts leading up to appellant's separation are as follows:

On or about May 3, 1975, Cadet Rick Andersen reported apparent violations of the Cadet Honor Code by appellant to appellant's section honor representative. Andersen charged appellant with lying to him on April 30, 1975 and with lying to one Captain Hausman, a class instructor, on May 2, 1975. Thereafter, on or about May 12, 1975, the Cadet Honor Committee convened to hear evidence against appellant as to both allegations of lying. On May 13 the Honor Committee issued its findings and charged appellant with one allegation, only, of attempting to deceive by lying on May 2, 1975 (A. 15).

Thereafter, on May 14, appellant met with the Deputy Commandant of Cadets as required by Academy procedures in Memorandum, USCC Processing of Cadet Honor Cases, 10 August 1973 (A. 20,21). Pursuant to the Memorandum, appellant was counseled by the Deputy Commandant as to the offense charged against him by the Honor Committee to insure that he fully understood the charge against him and his option to resign from the Academy or elect a Board of Officers hearing (A. 16-17, 21). After counseling, appellant elected a hearing before a Board of Officers which was subsequently held on May 30, 1975.

After having been counseled on the charge found against him by the Honor Committee and making his election for a Board hearing, appellant's file was transmitted to the Superintendent of the Academy with the recommendation that he convene a Board of Officers to hear appellant's case (A.17).

Thereafter, the Superintendent, apparently acting on the recommendation of the Staff Judge Advocate (A.18), overruled the determination of the Cadet Honor Committee which had considered, and not reported out as found, the allegation that appellant lied on April 30. Without further counseling appellant, the Superintendent referred both charges for hearing before the Board of Officers. Thus, at the Board hearing the Recorder read the following charges (A. 43-44):

"The general nature of the hearing is as follows: to investigate the truth of and enter findings upon the following allegation, that Cadet Keith D. Gaines, Company E-3, Class of 1975, United States Corps of Cadets, is alleged to have violated the cadet honor code in that he did, at West Point, New York, on or about 30 April 1975, lie, by stating to Cadet Richard Andersen that he had been excused from attending his surveying class by his instructor, Captain William Hausman, when in fact, he had not been so excused, and on or about 2 May 1975, lie by stating to Captain William Hausman that he was on a concrete class field trip on 30 April 1975 when in fact he was not."

Thus, notwithstanding the fact that the Cadet Honor Committee considered both the above allegations and only

reported out the latter May 2 allegation as found, and notwithstanding the fact that the Deputy Commandant advised appellant as to that latter charge only and appellant considered only that charge in making his election for a Board of Officers hearing rather than resignation, the Board undertook to hear and make findings as to both allegations and, in fact, found appellant guilty of both allegations. Appellant's military counsel's motion to dismiss the April 30 charge on the ground that it had not been found by the Cadet Honor Committee, was denied.

Prior to the denial of this motion to dismiss, trial counsel conducted a voir dire examination of the Board members. In questioning one Captain Hayes, a tactical officer familiar with the procedures of the Cadet Honor Committee and the separation process for honor violations, it developed that Hayes believed that the proceedings before the Cadet Honor Committee were entitled to be considered by the Board. He believed that the finding of the Honor Committee that appellant was guilty of lying was entitled to weight and would have a psychological impact on him in his deliberations since he believed that to acquit appellant would be to reverse the Honor Committee (A. 41-42). It is submitted that Captain Hayes' testimony on voir dire established bias and warranted his removal from the Board because of his admission that he would

give undue weight to the existence of a mere accusation in his deliberations and that it was error for the President of the Board to deny appellant's motion to remove Captain Hayes.

After the hearing before the Board of Officers appellant was found guilty of both charges, as noted above, and thereafter the findings of the Board were approved by the Superintendent who recommended to the Secretary of Army not only that appellant be separated from the Academy, but also that appellant be ordered to active duty as an enlisted man for three years (A. 45). That recommendation was thereafter approved by the Secretary of the Army (A. 46).

It is appellant's contention on this appeal, and will be argued below, that the Academy, in promulgating specific procedural guidelines for the processing of Honor violations within the Cadet Honor Committee and, where the Committee has voted a violation, there are specific procedural guidelines for counseling the cadet as to the charge of the Committee so he may elect to resign or appear before a Board of Officers, is bound by its own procedures. And, further, that by adding an additional charge against appellant, considered and not found by the Committee, which appellant was never counseled on, the Academy has violated its own procedures in separating appellant and has deprived appellant of due process of law.

POINT ONE

DEFENDANTS FAILED TO ADHERE TO THEIR
OWN REGULATIONS GOVERNING CONSIDERA-
TION AND PROCESSING OF ALLEGED HONOR
CODE VIOLATIONS BY APPELLANT

- A. The Action of the Superintendent in Referring for Trial Before a Board of Officers an Allegation of Lying not Founded by the Cadet Honor Committee Violated the Academy's Own Regulations and Tainted the Entire Board Proceedings.

Under the regulations and procedures of the Academy, any apparent violation of the Cadet Honor Code ^{*/} is to be referred to the Cadet Honor Committee. See Memorandum "USCC Processing of Cadet Honor Cases", 10 August 1973, Commandant of Cadets (A.20). See, also, Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975), aff'd 367 F. Supp. 1263 (S.D. N.Y. 1973). The Committee is composed of cadets elected to their positions and its purpose and procedures are outlined in an Academy booklet of the United States Corps of Cadets, "The Cadet Honor Code & System" (A.38). That publication defines the purpose and procedure of the Committee as follows:

"The Honor Committee, acting for the Corps, investigates and determines whether or not the alleged offender has actually transgressed the Honor Code First, there is a preliminary investigation by a sub-committee of three members of the Honor Committee. Second,

^{*/} The Honor Code states "A cadet will not lie, cheat nor steal nor tolerate those who do."

the full committee conducts a hearing during which the accused as well as all witnesses testify Twelve members are designated, however, to serve as the tribunal on any particular case. Voting is secret and a finding of guilty requires a unanimous concurrence of the twelve man tribunal. In every case the findings and recommendation of the Committee are made known to the accused

"If there be a finding of guilty, the Commandant reviews the case with his advisors and with the chairman of the Honor Committee. He then interviews the accused after advising him of his rights ... and, in effect, extends to him the option of resigning or having his case considered by a Board of Officers" (at page 7)

Thus, according to the regulations and procedures of the Academy, the Cadet Honor Committee is the necessary first step in the processing of Honor violations. As this Court wrote in Andrews, supra, at p. 906:

"While the Academy has long had the informal practice of referring all alleged violations to the Cadet Honor Committee, the relationship between that committee and the separation process has to a degree been formalized."

It is conceded that the Regulations of the USMA, promulgated by the authority of the Secretary of the Army, in the relevant Article 16 governing separation from the Academy and Article 12 (12.14) governing discipline (Honor Code Violations) makes no reference to the role of the Cadet Honor Committee in the separation process. However, the Academy itself having elected to use the Cadet Honor Committee as the first step in

the separation process in appellant's case, whether required to or not, is now bound by that election to adhere to all of the regulations and procedures promulgated by the Academy for the processing of alleged honor violations. Smith v. Resor, 406 F.2d 141 (2d Cir.1969). That the Academy is so bound is implicit in this Court's language in Andrews, quoted above. Thus, while the Regulations for the Academy promulgated by the authority of the Secretary of the Army may give the Superintendent of the Academy the power to by-pass the Cadet Honor Committee completely in the separation process, the Academy by its own procedures promulgated by it has bound itself to adhere completely to those procedures and regulations governing the role of the Cadet Committee in the separation process, and the action to be taken by the Academy after the Cadet Honor Committee has acted.

1. The Academy procedures within the Cadet Honor Committee

This Court, in describing the procedures of the Cadet Honor Committee, referring to the Commandant's Memorandum of November, 1972, the precursor of the Memorandum cited above, wrote:

"Regardless of whether the relationship be deemed formal or informal, the Honor Committee under its own procedures provides that a single 'not guilty' vote by a member ends the matter, while a 'guilty' finding confronts a cadet with the hard choice of either resigning or electing to go before a Board of Officers. An adverse finding there results not only in formal separation from the Academy but also in a damaging record that will follow the cadet through life. Accordingly, we

conclude that the Cadet Honor Committee, acting not unlike a grand jury, is clearly part of the process whereby a cadet can ultimately be adjudged to have violated the Cadet Honor Code and be separated from the Academy." (p. 906)

The Academy's own regulations as well as this Court have thus held the Cadet Honor Committee to be the first line in the separation process. As this Court noted above in Andrews, the Committee is in function and structure very like a grand jury; it investigates, hears testimony and votes charges.

After this Court's decision in Andrews, the Cadet Honor Committee promulgated new internal procedures for its own operations, which new procedures were in effect at the time the Committee considered appellant's case. See affidavit of Cadet Andersen and annexed procedures, Appellant's Appendix, p. 27. The new procedures do not specifically require a unanimous vote of the Committee with one "not guilty" vote ending the matter, but rather, are entirely silent as to the vote required to report a charge out as founded.

In the instant case the Cadet Honor Committee convened to hear evidence as to apparent violations of the Code by appellant in that appellant was alleged to have lied to a Cadet Rick Andersen on April 30, 1975 and to one Captain Hausman on May 2, 1975. The Committee heard testimony of various witnesses as to both incidents. */ The findings of the Committee, however,

*/ The testimony before the Committee was tape recorded and counsel for both sides heard that tape. The tape was not transcribed since it added nothing to the Committee's report but merely confirmed that testimony was heard as to both charges.

voted only the May 2nd allegation founded. The failure of the Committee to mention the April 30 incident in its finding, together with the fact that the incident was clearly considered by the Committee indicates that the Committee, after review, determined the April 30 allegation to be unfounded.

Notwithstanding the failure of the Committee to vote the April 30 allegation founded after it was brought before it and considered by it, the Superintendent overruled the action of the Committee and referred to the Board of Officers the April 30 allegation in addition to the May 2nd allegation. The Board of Officers, which appellant elected in lieu of resignation, then took testimony as to the April 30 allegation and convicted appellant of it.

Respondents contend that under §16.04 of the Regulations for the U.S. Military Academy and under Andrews, the hearing before the Board of Officers is a de novo hearing and therefore the Board was neither bound by the findings of the Committee nor acting improperly in considering charges not voted valid by the Committee, but bound only by the charges as referred by the Superintendent.

While it is true that the hearing before the Board of Officers is a de novo hearing, appellant submits that the only reasonable interpretation of that term, in light of the Academy's procedures in referring all apparent violations to the Committee for investigation and first action and in light of the

Academy's procedures for processing Honor violations after the Cadet Committee has acted, discussed in Part 2 below, is that the hearing is de novo as to the charges voted valid by the Committee.

Further, the holding in Andrews is consistent with the view that the Board of Officers must confine its hearing to those charges voted valid by the Committee. In Andrews, the plaintiffs were contending that the procedures of the Committee violated their due process rights. This Court held that while the Committee proceedings were a significant part of the separation process so as to constitute governmental activity, due process was not violated since the Committee's function was that of the grand jury - preferring charges - and the hearing before the Board was a de novo hearing which conformed to due process in that case. Thus the Court reasoned that since the Committee had no greater responsibility than to validate charges or not and since the subsequent hearings on the validated charges were fair, the plaintiffs had suffered no injury. In Andrews, the Court held that the Academy, by its action in referring all apparent Honor violations first to the Committee, in effect placed the Committee in the role of grand jury.

It should be noted again, here, that the issue is not whether the Academy was required to refer these matters to the Cadet Honor Committee or to develop a cadet investigation system that would act as a grand jury. The fact is that the

Academy has done so and, having done so, is now bound to do so fairly and in compliance with their own regulations and procedures and with appellant's due process rights. Smith v. Resor, supra; Feliciano v. Laird, 426 F. 2d 424 (2d Cir. 1970); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Hagopian v. Knowlton, 470 F. 2d 201 (2d Cir. 1972). The Academy, having created a system of first investigation and review by a Cadet Honor Committee with the power to validate charges or fail to validate charges, is bound by that system. The Academy, having created a Committee whose purpose and procedure is like a grand jury, is bound by considerations of due process to abide by that Committee's determinations.

2. The Academy procedures after the Cadet Honor Committee has acted and reported out an Honor violation.

In a Memorandum dated 10 August 1973 entitled "USCC Processing of Cadet Honor Cases", annexed to the affidavit of Major Shimek, the Staff Judge Advocate at the Academy, and appearing in Appellant's Appendix at page 20, the Commandant of Cadets sets forth the purpose of the Memorandum as to prescribe the procedures to be followed in processing a cadet who has been found to have violated the Honor Code by the Cadet Committee. That Memorandum mandates, inter alia:

"C. Deputy Commandant will:

(1) Review the Honor Committee's report of the case.

* * * *

(3) In a personal interview with the cadet concerned:

(a) Inform the cadet of the charge and of the allegations of the Cadet Honor Committee.

(b) Advise the cadet of his rights under Article 31, UCMJ and of his right to counsel.

(c) Insure that the cadet understands the allegation and the options of resigning or electing to have the matter considered by a Board of Officers.

* * * *

It should be noted that the above procedures mandated of the Deputy Commandant take place prior to any referral of the matter to the Staff Judge Advocate or the Superintendent and immediately after the Honor Committee acts on charges. No one at the Academy is involved in the procedure other than the Committee, the cadet and the Commandant until the cadet elects either resignation or trial before a Board of Officers. Thus, at the time of this required counseling the Commandant has before him only the report of the Cadet Committee to aid him in counseling the Cadet. After a cadet has been counseled and has made his election to stand trial before a Board of Officers the matter is then referred to the Staff Judge Advocate and the Superintendent to convene a Board. No memorandum, regulation or procedural outline provides that either may add additional charges or specifications to the charge referred out by the Honor Committee, although the Superintendent may delete charges of the Committee. Further, since there is no provision for

further counseling of a cadet with a new opportunity to elect resignation or Board hearing after the matter has been referred to the Staff Judge Advocate and Superintendent, it would appear that the Academy has not intended to reserve to either of them the inherent power to add additional charges or specifications to the charge founded by the Cadet Honor Committee.^{*/}

In the instant case, the Cadet Honor Committee heard evidence as to at least two allegations that appellant violated the Honor Code, by lying to Cadet Andersen on or about April 30 and by lying to Captain Hausman on or about May 2. While the deliberations and voting of the Honor Committee are secret, the report of the Committee establishes that the Committee did in fact hear evidence as to both charges but reported out only a finding that the evidence supported the allegation that appellant lied on or about May 2.

Thereafter, the Commandant of Cadets met with appellant as required by the Memorandum cited above. The Commandant wrote the Superintendent a letter dated 14 May 1975 which appears in Appellant's Appendix at page 16, stating:

"Cadet Gaines was informed of his rights under Article 31, Uniform Code of Military Justice, of his rights to counsel, and of the offense with which he was charged Cadet Gaines elected to have a Board of Officers hear his case"

^{*/} The right of election is a substantial right since, while resignation is, of course, a negative mark on the cadet's record for life, an additional stigma attaches to the separation after a Board hearing, as all the proceedings become a part of the cadet's record for life.

It is clear that the meeting with appellant and the Commandant of Cadets dealt with one offense, the only offense charged against him by the Honor Committee, that appellant on or about May 2 did attempt to deceive by lying. The Academy Memorandum cited above requires the meeting between cadet and Commandant be held to "insure that the Cadet understands the allegation and the options of resigning or electing to have the matter considered by a Board of Officers." Here the meeting between appellant and the Commandant insured only that appellant understood the one offense the Honor Committee charged him with and the option of electing to have that one matter considered by a Board of Officers.

The Superintendent of the Academy, pursuant to the regulations promulgated by the Secretary of the Army (16.03) is vested with the discretion in the case of an Honor violation to permit the cadet to resign, to court-martial the cadet or to convene a Board of Officers. The Superintendent of the Academy, pursuant to internal Memoranda and procedure and policy statements which have the force of regulation within the Academy, has created and bound himself to the working procedure outlined above for determining and processing allegations of Honor violations. The Superintendent, by the procedures promulgated by

the Academy, has vested the Cadet Honor Committee with the power to investigate charges, hear evidence and vote an allegation of misconduct founded or unfounded. The Superintendent by the procedures promulgated by the Academy has determined that when the Cadet Honor Committee votes an allegation founded, the cadet in question will be counseled by the Commandant on the charges voted by the Committee so that he can intelligently exercise the option of resignation or a Board hearing. By carefully outlining the procedure the Superintendent has bound himself to adhere to the procedure fully. If the Superintendent did not intend to be bound by the action of the Cadet Honor Committee in referring out a charge as founded, it is clear that the Superintendent would not have promulgated procedure to insure that a cadet was thoroughly counseled as to the charge founded so that he could intelligently make the difficult choice of resignation or Board hearing. It is submitted that the Cadet Honor Committee serves more than a training function for cadets and that the ultimate decision as to what charges will be the basis for a cadet's resignation or will be heard by a Board of Officers is determined by the Committee's action, by virtue of the procedures the Academy has voluntarily promulgated. If it were otherwise, the Superintendent would have no need of the deliberately complete procedures mandated of the Commandant but could, instead, have reserved to himself or the Staff Judge Advocate full power to review and/or revise the action of the Committee and then

counsel the cadet fully as to what he was facing so he could intelligently elect resignation or Board hearing. But this the Superintendent has not done by Memorandum or procedure or application previously, and this is not what the Superintendent did in the instant case.

It is submitted that the Superintendent, by the regulations and the procedures of the Academy, bound himself to the determination of the Cadet Honor Committee that the evidence it heard supported only the allegation that appellant attempted to deceive by lying on May 2. By submitting to the Board of Officers the additional charge that appellant attempted to deceive by lying on April 30, which charge was not reported out of the Cadet Honor Committee as founded and upon which appellant was never counseled, the Superintendent violated the Academy's own procedures and regulations and deprived appellant of due process of law. Smith v. Resor, *supra*; Rohe v. Froehlke, 500 F. 2d 113 (2d Cir. 1974); Lovaglio v. Froehlke, 468 F.2d 340 (2d Cir. 1972) cert. den. 411 U.S. 918; Nixon v. Secretary of the Navy, 422 F. 2d 934 (2d Cir. 1970).

The injury flowing from the failure to abide by the regulations and procedures giving the Cadet Honor Committee the responsibility and power to validate charges upon which the Cadet, after counseling, elects either to resign or appear before a Board of Officers, is clear. When appellant elected to

appear before a Board of Officers rather than resign he elected to stand trial on one charge of lying on May 2, 1975. The trial on that charge was inescapably tainted by the Board's charge and consideration of a second allegation of lying not validated by the Committee. Not only was appellant required to defend himself against a charge not validated by the appropriate body, but appellant was further prejudiced in that two allegations of lying are more serious than one and perhaps more likely to be believed than one on the theory of where there is enough smoke there's bound to be fire, but further, appellant was never counseled, pursuant to Academy procedures, as to what charges he was facing so he could intelligently opt for resignation or Board hearing.

Thus, the Superintendent in referring and the Board of Officers in considering an uncharged violation against appellant, not only acted in violation of Academy regulations and procedures but in violation of appellant's right to a fair hearing and due process of law.

B. The Board of Officers Convened to Hear the Charges Against Plaintiff was Improperly Constituted Thereby Depriving Plaintiff of a Fair Hearing and Due Process of Law.

The Board of Officers convened pursuant to Army Regulation 15-6 to hear the charges against plaintiff was improperly constituted in that members who exhibited bias against appellant were not excused and did not step down. AR 15-6 governs

board proceedings generally; it sets forth the standard of review, substantial evidence, and the nature of the proceedings. It does not specify who may or may not serve on a Board or set forth specific grounds for challenge of a board member.

The standard of procedural due process which must be met in proceedings to separate a cadet have been outlined in this Circuit. Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967); Hagopian v. Knowlton, 470 F. 2d 201 (2d Cir. 1972); Andrews v. Knowlton, supra. Those cases, in considering what process is due before governmental action separating a cadet may be taken, have emphasized flexibility in approach considering the circumstances and context of the given case. But in all instances the courts have held that a fair hearing is absolutely essential. And a fair hearing requires hearing officers who are unbiased and nonpartisan. See Administrative Procedure Act, 5 U.S.C. §556.

In the instant case, trial counsel's voir dire of the Board established bias and unfairness. Captain Hayes, a member of the Board, on questioning by appellant's military counsel stated that he had been a tactical officer for two years and had reported Honor violations against cadets. He further stated that he believed an acquittal by a Board of Officers would constitute a reversal of the Honor Committee and that the Honor Committee's determination in finding a cadet guilty of violating the code was entitled to weight and consideration

and would have a psychological impact on him.^{*/}

In addition, the testimony of Captain Hayes on voir dire examination illustrates the unfairness of Board's consideration of an alleged Honor violation not reported out by the Honor Committee and reflects the argument asserted in Part A above that this consideration violated the procedures set down by the Academy for the processing of Honor violations.

Captain Hayes, when asked if he thought some weight should be attached to the Honor Committee proceedings said:

"Oh, yes, certainly. I think there has to be a certain amount of weight attached to it in the sense that the cadets found the cadet -- The honor committee, in their estimation found the cadet guilty of violating the honor code"

(A. 41)

Captain Hayes, an officer familiar with the honor system, in his answer clearly indicated that his knowledge of the system was that a charge would not come before a Board of Officers unless it had been found by the Honor Committee. And, because it had been found by the Honor Committee he believed it was entitled to some weight. And yet, in the instant case

^{*/} It should be noted that this is precisely the issue raised in Andrews which this Court dismissed as lacking support in the record. There the plaintiffs alleged that the familiarity of the officers with the Honor System adversely affected their ability to sit fairly. Here the support lacking in Andrews in fact exists in Captain Hayes' admission that his experience with the system would have an impact on his deliberation.

one of the charges before the Board on which Captain Hayes sat was not found by the Honor Committee. Nevertheless, Hayes believed it was because he knew Academy procedure in Honor cases, and therefore gave added weight to the charge in his consideration, all to appellant's prejudice.

Notwithstanding his clear statements that the proceedings before the Honor Committee would affect him, the President of the Board, Colonel Buckley, refused plaintiff's motion to challenge Captain Hayes for cause.

It is submitted that Colonel Buckley's determination was clear error and deprived appellant of a fair hearing. The proceedings before the Honor Committee result in an accusation, the truth of which must be established before the Board of Officers at a de novo hearing. By giving any weight to the fact of an accusation, Captain Hayes was acting improperly and unfairly toward appellant, assuming he was guilty and that a vote to acquit him would be a reversal of prior proceedings. Captain Hayes' voir dire examination established bias which it was error for Colonel Buckley to ignore. Partiality by a trier of fact is impermissible and a judgment so founded may not stand. See NLRB v. National Paper Co., 216 F.2d 859 (5th Cir. 1954); Local 134, International Brotherhood of Electrical Workers v. NLRB, 486 F. 2d 863 (7th Cir. 1973), rev'd on other grounds, 42 L.Ed. 2d 558 (1975).

POINT TWO

THE DECISION TO ORDER APPELLANT TO ACTIVE
DUTY AS AN ENLISTED MAN FOR THREE YEARS
WAS UNDULY HARSH AND WAS MADE IN VIOLATION
OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW

Pursuant to the Regulations for the United States Military Academy, Article 12, §12.14 (A.33), a cadet found to have violated the Honor Code must be separated from the Academy. However, pursuant to 10 U.S.C. §4348(b) a cadet so separated may be transferred by the Secretary of the Army to the Army Reserves and may be ordered to active duty as an enlisted man for a period not in excess of four years. Thus transfer and activation are not mandated but, rather, are discretionary acts by the Secretary, who, of course, is guided by the recommendation of the Superintendent.

In the instant case the Superintendent recommended that appellant be ordered to active duty as an enlisted man for three years (A. 45) which recommendation was approved (A. 46), apparently without any independent investigation, by the Secretary.

It is submitted that as a result of the Superintendent's wrongful submission to the Board of Officers of a charge considered by the Cadet Honor Committee and not reported out as found by them, and the Board's action in considering that charge and finding appellant guilty of it, that the entire record was tainted by the Academy's failure to follow its own procedures. Therefore, the

decision of the Superintendent to recommend that appellant be ordered to active duty was based on a record which improperly charged and convicted appellant of two violations of the Honor Code.

As argued above in Point One, two charges of lying are far more serious than one since they suggest habitual misconduct rather than a single errant act, and the charges themselves, because of their similarity, may tend to confirm each other's truth in the eyes of the fact finder. Clearly, two findings that appellant in fact was guilty of lying is also far more serious than one would be, assuming that appellant would have been convicted at all had the Board only considered the one charge properly before it.

Thus, because of the Academy's failure to adhere to its own procedures, appellant's record was substantially damaged. It cannot be said that the decision of the Superintendent and the Secretary to order appellant to active duty was not based on the fact that appellant's record reflected repeated misconduct rather than one single error, as a result of the Academy's failure to adhere to its own procedures.

In the Andrews case, the plaintiffs who had been separated but, apparently, not ordered to active duty, challenged the sole penalty of expulsion for their violations as being arbitrary and a denial of due process. This Court held that although the penalty was indeed severe, since it was known to all cadets from the start of their careers it did not violate due process.

In the instant case, appellant has been subjected to the severe penalty of separation from the Academy, with its concomitant loss of academic credits and officer's commission. But in addition, appellant is being subjected to the additional penalty of active duty as an enlisted man for three years.

Further, the additional penalty of activation is an arbitrary one in that it is made without reference to guidelines or regulations of any kind. The final act of the Secretary is discretionary with no apparent standards to enable a determination of whether or not the Secretary abused his discretion. The intermediate recommendation of the Superintendent is, likewise, discretionary. ^{*/} It is submitted that where no reason is given to support the recommendation of active duty or the order to active duty and where the severe penalty of activation may be visited upon one honor-violator cadet and not on another such cadet, that such penalty is arbitrary and a deprivation of appellant's right to equal protection and due process of law. See Hammond v. Lenfest, 398 F. 2d 705 (2d Cir. 1968); United States ex rel Checkman v. Laird, 469 F. 2d 773 (2d Cir. 1972).

As this Court noted in Andrews, appellant did, in fact, have notice of the fact that if he were found guilty of an Honor

^{*/} While the Regulations for the Academy, 16.01(e) indicate that a Cadet in appellant's position will "normally" be ordered to active duty, nowhere does it indicate under what circumstances this will not be done. Therefore, the Superintendent could presumably recommend active duty for appellant and not for an identically situated cadet, under these regulations, based on no more than a whim.

violation he would be separated from the Academy. He did not, however, have notice of under what circumstances his separation might also entail his activation as an enlisted man for three years. It is submitted that the failure of such notice distinguishes appellant's situation from that in Andrews and constitutes a denial of due process of law.

It should be noted at this point that while appellant's complaint raised this issue below (see ¶12, Complaint), this issue was never answered by respondents nor was it dealt with in any manner by the court below in its opinion. Thus there has been no opportunity to develop what additional facts, if any relate to respondents decision, in their discretion, to order appellant to active duty as an enlisted man for three years. Thus, any justification offered by respondents for such determination should be the subject of a remand to the District Court to develop fully the facts and circumstances surrounding respondents' exercise of discretion.

Conclusion

WHEREFORE, it is respectfully requested that the judgment of the District Court be reversed or, in the alternative, that this matter be remanded to the District Court to determine such questions of fact as that court has heretofore failed to determine.

Respectfully submitted,

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